



IN RE: STEVEN S. DeYOUNG

NO. BD-2012-002

S.J.C. Order of Public Reprimand entered by Justice Cordy on March 22, 2012.¹

Page Down to View Board Memorandum

¹ The complete Order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County.

**COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT**

_____)
BAR COUNSEL,)
Petitioner,)
)
vs.)
)
STEVEN S. DeYOUNG, ESQ.,)
Respondent.)
_____)

BOARD MEMORANDUM

A hearing committee has recommended that the respondent, Steven S. DeYoung, be suspended for two months for misconduct during his representation of the wife in a divorce case: he filed a financial statement in which he deliberately left blank the space that asked for his client's gross income for the preceding year. Acknowledging his misconduct, the respondent has appealed from the proposed sanction on the ground that a suspension would be "markedly disparate from the discipline imposed in comparable cases." Matter of Alter, 389 Mass. 153, 3 Mass. Att'y Disc. R. 3 (1983). He asks that we impose an admonition or, at most, a public reprimand. Bar counsel opposes the appeal and seeks imposition of the suspension recommended by the hearing committee. Oral argument having been held before the full board, we unanimously adopt the hearing committee's findings of fact and conclusions of law, and order the imposition of a public reprimand.

Findings of Fact

Background Information. This matter arose from the divorce of Attorney Kathleen Higgins (now Kilkenny), who has already been disciplined for her own misconduct, as was her employer, who assisted her in the misconduct. See Matter of Kilkenny, S.J.C. No. BD-2010-020 (2010), and Matter of Hammatt, S.J.C. No. BD-2011-033 (April 22, 2011).

Prior to 2001, Kilkenny worked as a secretary for Attorney William R. Hammatt. She was admitted to the bar in February of 2001, after which she began to work as an associate conducting real estate closings in Hammatt's office. She earned \$34,500 as a salaried employee in 2001.

Beginning in January 2002, Kilkenny became an independent contractor in Hammatt's office, where it was agreed that she would receive 50% of the net fees generated from the real estate closings she handled; that, regardless of her earnings she would receive a minimum, nonrefundable weekly draw of \$600; and that Hammatt would pay her the difference between her weekly draw and her 50% share. The draw was increased to \$700 in the spring of 2002 and to \$800 later that year. At the end of 2002, Hammatt paid her \$13,500 for fees she had earned over and above the draw already received, and she reported gross total income of \$55,303 on her tax returns for that year.

In November 2002, her husband filed an amended complaint for divorce. He sought alimony. In January 2003, Kilkenny filed, pro se, a financial statement disclosing her gross income for 2001 of \$34,500, but she did not disclose her gross income for 2002.

In 2003, Hammatt opened a separate account in which he deposited funds to pay Kilkenny's half of the fees earned in excess of her weekly draw, and Kilkenny was aware

of this account. Both understood that Kilkenny would be entitled to these funds on request or at the end of the year.

Represented by prior counsel, in April 2003, Kilkenny submitted responses to interrogatories propounded by her husband in which she stated that she had been self-employed since 1984 and that her current weekly income was \$619. She did not disclose her agreement with Hammatt to divide equally the net fees earned from closings conducted by her, nor did she disclose her gross earnings for 2002. Shortly thereafter, after inquiry by her counsel, Kilkenny served amended answers to the interrogatories in which she disclosed that she had received 50% of the fees generated by closings she handled and that in 2002, she had received a weekly draw of \$800 plus, at the end of that year, the balance owed her of \$13,500. Her amended interrogatory response accurately disclosed her 2002 income.

In September 2003, the husband's attorney sought to depose Hammatt concerning Kilkenny's employment relationship with him. In lieu of appearing for the deposition, Hammatt offered to make his payroll records available. He also told the husband's counsel that there was no employment contract or partnership agreement between Kilkenny and him.

In October 2003, the parties appeared in court for a pre-trial hearing. At that time, Kilkenny filed a financial statement with the court stating that her gross income for 2002 was \$44,635.00. The matter was scheduled for trial on December 12, 2003.

On October 14, 2003, Hammatt provided the husband's counsel with copies of the respondent's pay records. For 2003, the records provided showed only the draw payments. The records did show the year-end payments for 2002 and her gross income

for that year. The husband's counsel faxed a letter to Hammatt asking additional questions about Kilkenny's employment agreement and her income.

Hammatt drafted a letter in response, which was essentially accurate in describing the employment and pay agreement he had with Kilkenny, and then gave it to Kilkenny to review and edit. Kilkenny's edits substantially altered the letter, deleting the description of his agreement to pay the respondent 50% of the net fees she generated and also deleting the reference to payment of "accrued" fees at the end of the year, thereby misrepresenting the actual agreement and payments. The overall effect of her revisions was to make their arrangement appear to be one for the granting of discretionary bonuses. In late October 2003, Hammatt faxed the letter as revised by Kilkenny to the husband's counsel.

In early November 2003, Kilkenny's deposition was taken, during which Kilkenny refused to answer certain questions, including those referring to her business and employment arrangements with Hammatt.

The Respondent's Representation of Kilkenny. In November 2003, Kilkenny discharged her counsel and engaged the respondent to represent her in the divorce proceedings. Kilkenny informed the respondent that the primary disputes were over her payments to her husband for health insurance, ownership of a boat mooring, and reimbursement of legal fees her husband had incurred in pursuing discovery in the divorce proceeding.

The respondent filed his appearance on Kilkenny's behalf in probate court on November 17, 2003. The parties agreed to continue the trial until February 9, 2004. On November 20, 2003, the respondent spoke with the husband's attorney, who told him that

she had been unable to get information from Kilkenny about her income for 2003. That same day, the respondent sent a fax to the husband's counsel suggesting that the parties try to settle their disputes. He offered to try to address areas in which his client's deposition answers had been incomplete and to make her available for further testimony. On December 3, 2003, the husband's counsel sent the respondent a letter thanking him for the offer and suggesting they hire separate appraisers to evaluate both parties' properties.

In early December 2003, the respondent received a copy of Kilkenny's file from predecessor counsel and understood that, among other things, the husband's counsel was trying to determine Kilkenny's income for 2003. By that time, the respondent knew the amount of Kilkenny's income for 2001 and 2002, but Kilkenny had not disclosed to him her earnings for 2003.

Between November 22 and December 31, 2003, Hammatt issued six checks to Kilkenny in the total amount of \$81,484.08 to pay fees she had earned in excess of her weekly draw. Kilkenny's accountant prepared a profit-and-loss statement for 2003 that showed gross income of \$126,365.40 and net income of \$114,137.88.

On December 31, 2003, the respondent wrote to the husband's counsel that he would be out of the office for two weeks and that he would meet with his client on his return, when he would finalize her financial statement and deposition corrections. He asked the husband's counsel to tell him the husband's demands and stated that he hoped to make a settlement offer.

On January 5, 2004, the husband's counsel wrote to the respondent requesting a substantive settlement offer. She stated that her client's terms included: (1) Kilkenny's

paying the difference in the health insurance premium between an individual policy and a family policy; (2) granting the husband exclusive ownership of a boat mooring; and (3) reimbursing the husband for his legal expenses. In a subsequent conversation, the husband's counsel informed the respondent that the husband was seeking a payment of \$10,000 toward his attorney's fees.

On January 16, 2004, after a discussion with Kilkenny, the respondent advised the husband's counsel that Kilkenny would release her interest in the mooring and pay the difference in the health insurance costs, but was unwilling to pay the demanded legal fees. He reported that Kilkenny had authorized him to offer payment of \$2,000 toward legal fees. The respondent set out his analysis of the value of the parties' respective assets. He also advised that his client's income had declined substantially due to the decrease in mortgage refinancing.

On January 20, 2004, the husband's counsel sent a fax to the respondent setting out her analysis of the value of the parties' assets. She also stated that she believed Kilkenny was Hammatt's partner and that she wanted to know the source of Kilkenny's \$24,000 in savings.

The respondent then asked Kilkenny to explain where the money in savings had come from. In response, Kilkenny asked her accountant to prepare a financial statement, which was done based on bank records and receipts provided by Kilkenny. The accountant prepared a "Profit and Loss January through December 2003" statement that listed Kilkenny's gross income as \$126,365.40 and her net income as \$114,137.88.

A couple of days later, the husband agreed to accept a \$2,000 payment toward his legal fees, and the parties agreed to settle the case. The respondent drafted a settlement agreement and sent it to Kilkenny and the husband's counsel.

At the end of January 2004, Hammatt terminated Kilkenny's employment.

On February 5, 2004, the respondent and Kilkenny met at the respondent's office. By not later than that date, Kilkenny had given the respondent a copy of the 2003 profit and loss statement prepared by her accountant. During this meeting, they prepared a financial statement for filing with the court. Kilkenny's gross weekly income was estimated to be \$953.49. At least four other items on the financial statement were listed as "estimated" and two as "uncertain." The respondent left blank line 7 of the financial form, which asked for Kilkenny's gross income for the prior year. The hearing committee found that in doing so, the respondent acted intentionally with the purpose of preserving the settlement the parties had reached. The hearing committee also found that Kilkenny's gross income for 2003 was material and that the respondent knew it was material because one of the issues in reaching the settlement was the amount Kilkenny would pay towards her husband's attorney's fees.

That same day the respondent sent the husband's counsel Kilkenny's draft financial statement. In his cover letter, the respondent informed the husband's counsel that Kilkenny's employment with Hammatt had been terminated, that she had found temporary space to meet with clients at another attorney's office, and that, as a result of these changes, the figures in the financial statement for her projected income in 2004 were "pure guesses and nothing more."

On February 10, 2004, the parties and counsel signed the settlement agreement and appeared at the probate court for a final divorce hearing. The respondent filed Kilkenny's financial statement, which was the same as that previously sent to the husband's counsel: line 7, requesting gross income for 2003, remained blank. Kilkenny signed it under the penalties of perjury, and the respondent signed the "Statement of Attorney," which required him to acknowledge that, as the "attorney for the party on whose behalf this Financial Statement is submitted, I hereby state to the court that I have no knowledge that any of the information contained herein is false."

The hearing committee found that the respondent's conduct, in providing opposing counsel and the court with a financial statement from which he intentionally omitted Kilkenny's gross income from 2003, and in certifying the financial statement with such an omission, violated Mass. R. Prof. C. 8.4(c), (d) and (h). The court accepted the settlement agreement and entered an order of judgment nisi.

About a week before the judgment would have become final, the husband's counsel received information from her client suggesting that Kilkenny had purchased a law practice. (In fact, she had not purchased a practice but had gone into business for herself.) The husband's counsel then filed motions to stay the entry of final judgment and to reopen the case.

The hearing committee found that it would be speculative to try to determine what harm, if any, resulted from the respondent's conduct and that his conduct was motivated by his efforts to settle the matter and not by any selfish reasons. After comparing the respondent's conduct to that at issue in Hammatt and Kilkenny, the committee recommended a suspension for two months.

The Appropriate Sanction

In recommending a suspension, the hearing committee compared the respondent's conduct to that of the other two participants in this imbroglio: Kilkenny, who was suspended for three months, and Hammatt who was suspended for one month. Viewing the respondent's conduct as more grievous than Hammatt's but not as bad as Kilkenny's, the committee settled on a two-month suspension. We are not convinced that the comparison is accurate or that such a comparison should determine the appropriate sanction.

We do not believe that the respondent's conduct was worse than Hammatt's. Hammatt plainly knew that Kilkenny's revisions to his letter describing their financial arrangement made the letter inaccurate and deceptive, in that it deliberately recast his payments to her as a year-end bonus instead of a contractual entitlement. In fact, Hammatt testified that he had accepted the revisions because he wanted to make the husband's counsel's job more difficult. See Matter of Hammatt, S.J.C. No. BD-2011-033, Board Memorandum at 5 ("At the time I agreed to send the letter she had redrafted in [her] favor, I felt I was helping her by making [her husband's attorney's] job more difficult . . ."). While Hammatt's deception was not directly practiced on the court, it was also more studied, deliberate, and affirmatively false than the respondent's conduct, which made no false representation on the financial statement. Hammatt's misconduct was also aggravated by (1) prior discipline and (2) an additional count for inadequate recordkeeping of client funds with resulting deprivation. See id. at 6-7. Given his disciplinary history, such conduct by itself would have warranted a public reprimand. The respondent's conduct can be further distinguished from that of Kilkenny and

Hammatt by the absence, on the respondent's part, of any affirmative misrepresentations.

More to the point, however, we do not believe the appropriate sanction here should hinge on the extent to which it was more or less grievous than that of the other lawyers caught up in the web of Kilkenny's divorce. We look instead at cases involving the absence of full candor before the court. This is not a case in which the lawyer "perpetrated a fraud on the court and opposing counsel" by "actively misrepresenting" facts central to the issues before the court, as was the case in Matter of Neitlich, 413 Mass. 416, 8 Mass. Att'y Disc. R. 167 (1992), and Matter of McCarthy, 416 Mass. 423, 9 Mass. Att'y Disc. R. 225 (1993). Nor was his decision to leave a single item blank part of a deceptive process of selective inclusion and exclusion like that characterized by the misconduct at issue in Matter of Angwafo, 25 Mass. Att'y Disc. R. 8, 16 (2009).

The respondent's omission was also more passive and less intentionally deceptive than that at issue in Matter of Mahlowitz, 1 Mass. Att'y Disc. R. 189 (1979), which involved a lawyer who "failed correct the court's misapprehension that there existed a prior court order in effect restraining the sale of certain property." The property in question was then conveyed to another. Similarly, in Matter of Dolan, 10 Mass. Att'y Disc. R. 59 (1994), the lawyer disregarded a difficult client's refusal to settle a civil action on terms the lawyer thought appropriate. Instead of conveying the client's proposed counteroffer, Dolan told opposing counsel he had authority to settle on terms she had rejected, entered into a settlement agreement, received and disbursed the settlement proceeds, and filed with the court a stipulation for dismissal that falsely reported the matter as settled. Id. at 60-61. The Court found Dolan's conduct was an

effort to resolve a conflict with a difficult client, not to deceive the court, and the single justice rejected the board's recommendation that he be suspended.

Mahlowitz and Dolan both received public reprimands. We find it difficult indeed to perceive the respondent's misconduct in filing a statement with his client's income left blank as more grievous than theirs. He made no affirmative misrepresentation, and he was (like Dolan) motivated by a desire to settle a difficult case, not to delude the court or the other side. In such circumstances, a stiffer sanction than was imposed in Mahlowitz and Dolan would be "markedly disparate." See Matter of Alter, 389 Mass. 153, 156, 3 Mass. Att'y Disc. R. 3, 6-7 (1983). We note further that Kilkenny had just lost her job, which diminished the materiality of her prior year's income. Given all the circumstances, we believe a suspension would not be appropriate here.

Conclusion

For the forgoing reasons, we adopt the hearing committee's findings of fact and conclusions of law, but amend its proposed disposition. The respondent, Steven S. DeYoung, shall be publicly reprimanded.

Respectfully submitted,

THE BOARD OF BAR OVERSEERS

Mary B. Strother, Esq.
Secretary

Voted: December 12, 2011